PUBLIC BANK BHD

v.

MOHD NADZRI A HALIM

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: S5-22-886-99]
24 SEPTEMBER 2002

CIVIL PROCEDURE: *Summary judgment - Banking - Loan and overdraft facilities - Interest - Notice of demand - Interest charged was 3.50% above bank's base lending rate - Notices of demand sent to wrong address - Whether not a proper case for summary judgment - Rules of High Court 1980, O. 14*

This was an appeal against the decision of the learned deputy registrar refusing the plaintiff's application for summary judgment under O. 14 Rules of the High Court 1980. The facts were that the plaintiff had granted several financial facilities to the defendant, including an overdraft facility of RM500,000 ('OD facility I'). The defendant defaulted and notices of demand were issued by the plaintiff claiming *inter alia* for repayment of RM1,351,424.03 as sum indebted under OD facility I. In demanding for the repayment, however, the plaintiff had charged an interest of 10.30 % on the facility, a rate that was 3.50% above the plaintiff's base lending rate of 6.80%. It was also evident that, of the notices of demand sent to the defendant, three were seen to be bearing an address different from the address stated in the writ of summons. No affidavit evidence was adduced to show that the address used in the three notices of demand was in fact the last known place of residence or business of the defendant, and that being so, a question arose before the learned judge herein as to whether this was a fit and proper case for summary judgment to issue.

Held:

[1] The issue of the claim for the sum of RM1,351,424.03 under OD facility I as opposed to the actual quantum of RM500,000 granted under the same, was a triable issue that needs to be adjudicated by the court. (p 247 e-f)

[2] There was also a triable issue in regard to the wrong address that was used to send the letters of demand or the notices. Clearly, the 'usual or last known place of residence … or last known place of business' of the defendant ought to be investigated upon. Hence, this was not a clear case for an O. 14 judgment. (p 251 c-d)

[Appeal dismissed]

Case(s) referred to:

Avel Consultants Sdn Bhd & Anor v. Mohamed Zain Yusof & Ors [1985] 2 MLJ 209 ***(refd)***

Balli Trading v. Afalona Shipping, The Coral [1993] 1 Lloyd's Rep 1 ***(refd)***

Beswick v. Beswick [1968] AC 58 ***(refd)***

Centrovincial Estates plc v. Merchants Investors Assurance Co Ltd [1983] Com LR 158 ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd [1990] 3 MLJ 1 ***(refd)***

Crown House Engineering Ltd v. Amee Products Ltd [1989] 48 BIR 32 ***(refd)***

David Chong Ket Sui v. Datuk Chau Tet On (Chairman and office bearer of Royal Sabah Turf Club for and on behalf of himself and the Management Committee of the Royal Sabah Turf Club) [1993] 3 CLJ 468 HC ***(refd)***

Drummer v. Brown [1953] 1 QB 710 ***(refd)***

Emmanuel E Okwuosa & Ors v. The Owners of and Other Persons Interested in the Ship "MV Brihope" and Hong Leong Leasing Sdn Bhd (Interveners) [1995] 2 CLJ 250 HC ***(refd)***

Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors [1989] 1 CLJ 919; [1989] 1 CLJ (Rep) 537 HC ***(refd)***

Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd [1988] 2 MLJ 397 ***(refd)***

Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd (in liquidation) [1990] 1 WLR 153 ***(refd)***

Krishnamurthy Nagaratnam & Anor v. Malayan Finance Corporation Bhd [1986] 1 CLJ 541; [1986] CLJ (Rep) 170 SC ***(refd)***

Leco Investments (UK) Ltd v. Land Pyrometers Ltd [1982] RPC 133 ***(refd)***

Leong Gan & Ors v. Tan Chong Motor Co Ltd [1969] 2 MLJ 8 ***(refd)***

Lin Securities (Pte) v. Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party) [1989] 1 MLJ 321 ***(refd)***

Loo Sze Kin v. Cheong Choy Teik [1997] 4 MLJ Supp 537 HC ***(refd)***

Majlis Islam Negeri Johor v. United Merchant Finance Bhd (MUI Continental Insurance Sdn Bhd, Third Party) [1995] 4 MLJ 482 HC ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Malaysian Assurance Alliance Bhd v. Yeam Sai Ming & Ors [1996] 5 MLJ 345 HC ***(refd)***
Marina Sports Ltd v. Alliance Richfield Pte Ltd [1990] 3 MLJ 5 ***(refd)***
McLardy v. Slateum [1890] 24 QBD 504 ***(refd)***
Miles v. Bull [1968] 3 All ER 632 ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Ponniah v. Sivalingam & Ors [1991] 3 MLJ 190 HC ***(refd)***
Posner v. Scott-Lewis [1986] 3 WLR 531 ***(refd)***
Re General Rail Syndicate, Whiteley's Case [1900] 1 Ch 365 ***(refd)***
Shaik Alauddin v. Kamarutheen K Dawood [1988] 3 MLJ 336 HC ***(refd)***
Shell-Mex & BP Ltd v. Manchester Garages Ltd [1971] 1 All ER 841 ***(refd)***
Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 ***(refd)***
Tan Eng Choong v. Foo Kai Yuen & Anor [1988] 1 CLJ 691; [1988] 2 CLJ (Rep) 461 HC ***(refd)***
The August 8 [1983] 2 AC 450 ***(refd)***
Verrall v. Great Yarmouth Borough Council [1981] QB 202 ***(refd)***
Voo Min En & Ors v. Leong Chung Fatt [1982] 2 MLJ 241 FC ***(refd)***
Wallersteiner v. Moir [1974] 1 WLR 991 ***(refd)***
Wallingford v. Mutual Society [1880] 5 App Cas 685 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 2

For the plaintiff - Rachael Koh Meng Hui; M/s Iza Ng Yeoh & Kit
For the defendant - R Suresh A Rajaratnam; M/s R Suresh & Assoc

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a summons in chambers in encl. 5, the plaintiff applied for summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC") and the learned deputy registrar refused to accede to that application and she accordingly dismissed it with costs. Aggrieved by that decision, the plaintiff filed an appeal to the judge in chambers as seen in encl. 16.

The Facts Of The Case

The defendant was, at all material times, and even currently a customer of the plaintiff. As a customer, the defendant was offered by the plaintiff by way of the letters of offers the following banking facilities and these offers were duly accepted by the defendant:

(1) An overdraft facility for RM500,000 under an old account bearing number 01-66-02088-7 which was subsequently converted to a new account bearing number 3084366627 and that overdraft facility which was granted by the plaintiff to the defendant was by way of a letter of offer dated 30 March 1994 (hereinafter referred to as the "OD facility I").

(2) An overdraft facility for RM211,080 under an old account bearing numbers 01-66-03771-5, 01-66-02088-7 and 01-66-03771-5 which were subsequently converted to a new account bearing number 3084473236 and that overdraft facility was granted by the plaintiff to the defendant by way of letters of offers dated 14 March 1996 and 5 October 1996 (hereinafter referred to as the "OD facility II").

(3) A fixed loan facility for RM106,000 under an old account number 05-66-70171 which was subsequently converted to a new account bearing number 2027214015 (200010) and that fixed loan facility was granted by the plaintiff to the defendant by way of a letter of offer dated 5 October 1996 (hereinafter referred to as the "FL facility I").

(4) A fixed loan/MRTA facility for RM123,072 under an old account number 05-66-70160-5 which was subsequently converted to a new account bearing number 2023254414 (00010) and that fixed loan/MRTA facility was granted by the plaintiff to the defendant by way of a letter of offer dated 14 March 1996 (hereinafter referred to as the "FL facility II").

(5) A fixed loan facility for RM58,000 under an old account number 05-66-70174-8 which was subsequently converted to a new account bearing number 2027215034 (00010) and that fixed loan facility was granted by the plaintiff to the defendant by way of a letter of offer dated 5 October 1996 (hereinafter referred to as the "FL facility III").

In pursuance to the letters of offers and as security for the OD facility I, OD facility II, FL facility I, FL facility II and FL facility III, the following documents were executed by the defendant in favour of the plaintiff:

(a) By way of a security for OD facility I

A legal charge for RM500,000 was created over a piece of property held under HS(D) No: 5200, P.T. No: 29782, Mukim of Kuala Lumpur, Wilayah Persekutuan which is also known as number 69, Lorong Zaaba, Taman Tun Dr. Ismail, Kuala Lumpur *vide* charge presentation number 5221/94 Jilid 749 Folio 28 (hereinafter referred to as the "legal charge").

(b) As security for OD facility II

(i) A second loan agreement dated 7 November 1996 executed between the plaintiff and the defendant.

(ii) A second loan agreement dated 14 May 1996 executed between the plaintiff and the defendant.

(iii) A second loan agreement dated 19 November 1996 executed between the plaintiff and the defendant.

(c) As security for FL facility I

A first loan agreement dated 7 November 1996 executed between the plaintiff and the defendant.

(d) As security for FL facility II

A first loan agreement dated 14 May 1996 executed between the plaintiff and the defendant.

(e) As security for FL facility III

A first loan agreement dated 19 November 1996 executed between the plaintiff and the defendant.

For the sake of expediency, items (b) to (e) are hereinafter referred to as the ("loan agreements").

It was an express term of the letters of offers that the legal charge and the loan agreements pertaining to the OD facility I, OD facility II, FL facility I, FL facility II, and FL facility III shall be repayable on demand.

On top of what had been alluded to and as an additional security and condition for granting the OD facility II, FL facility I, FL facility II, and FL facility III to the defendant, the following deed of assignments were executed by the defendant in favour of the plaintiff:

(i) A deed of assignment dated 7 November 1996 executed by the plaintiff and the defendant for OD facility II and FL facility I over a piece of property known as Lot No: 0918, Diamond Creeks Country Retreat, Phase 2A held under part of the land known as P.T. No: 4021 under the Mukim of Ulu Bernam, district of Batang Padang, State of Perak and under master title no: H.S. (D) BP 395, Mukim of Ulu Bernam, district of Batang Padang, State of Perak (hereinafter referred to as "Property I").

(ii) A deed of assignment dated 14 May 1996 executed by the plaintiff and the defendant for OD facility II and FL facility II over a piece of property known as Lot No: PB-4 held under master title H.S.(D) 26499, P.T. No: 23884, Mukim of Kajang, district of Ulu Langat, State of Selangor (hereinafter referred to as "Property II").

(iii) A deed of assignment dated 19 November 1996 executed by the plaintiff and the defendant for OD facility II and FL facility III over a piece of property known as parcel B707, type B1, 5th Floor, Garden View Block held under G.M. No: 135, Lot No: 745, Mukim of Sirusa, district of Negeri Sembilan (hereinafter referred to as "Property III").

Now, it is, *inter alia*, an express term of the deed of assignments that the defendant assigns absolutely to the plaintiff:

(i) all rights, title, interests and full and entire benefits in and on Property I, Property II and Property III vested in the defendant pursuant to the sale and purchase agreements dated 22 January 1996, 7 June 1995 and 13 December 1995 respectively (hereinafter referred to as the "sale and purchase agreements"); and

(ii) the full and entire benefit of the sale and purchase agreements together with the full benefit granted thereby and all stipulations therein contained and all the remedies for enforcing the same.

Pursuant to the letters of offers, the legal charge, the loan agreements and the deed of assignments, the plaintiff proceeded to disburse and did disburse the OD facility I, OD facility II, FL facility I, FL facility II and FL facility III to the defendant. But, unfortunately, in breach of the agreement, the defendant had failed to utilise the OD facility I, OD facility II, FL facility I, FL facility II and FL facility III in a satisfactory manner and, in particular, the defendant had defaulted in the repayment of the sums due and owing under the said facilities which accounts are to date to be in

arrears and in excess respectively. The plaintiff by way of a notice of demand dated 18 June 1999 issued by their solicitors Messrs Iza Ng Yeoh & Kit demanded from the defendant payment of the outstanding sums of RM792,895.29 for OD facility I, RM9,232.16 for OD facility II, RM8,052 for FL facility I, RM7,605 for FL facility II, and RM3,670 for FL facility III and all these sums were calculated as at 3 June 1999 together with the interests accruing thereto.

By way of a second notice of demand dated 23 July 1999 that was issued through their solicitors Messrs Iza Ng Yeoh & Kit the plaintiff recalled the entire facilities granted to the defendant and the plaintiff also demanded from the defendant the payment of the outstanding sums of RM804,318.82 under OD facility I, RM11,015.27 under OD facility II, RM9,394 under FL facility I, RM10,647 under FL facility II and RM4,404 under FL facility III which were all calculated as at 19 July 1999 together with the interests accruing thereto.

By way of a third notice of demand dated 4 November 1999 that was issued through their solicitors Messrs Iza Ng Yeoh & Kit the plaintiff demanded from the defendant payment of the outstanding sums of RM1,351,424.03 under OD facility I, RM222,374.80 under OD facility II, RM106,098.42 under FL facility I, RM117,378.42 under FL facility II and RM55,208.05 under FL facility III and all these sums were calculated as at 1 November 1999 together with interests accruing thereto at the rate of 3.50% per annum above the bank's base lending rate which was said to be 6.80% per annum at monthly rests to the date of full settlement.

However, in spite of the notices of demand as alluded to above and being in breach of the agreement, the defendant had failed, refused and/or neglected to pay the outstanding sums as mentioned above or any part thereof to the plaintiff. It was averred that as at 15 November 1999, the defendant remained indebted to the plaintiff for the outstanding sums of RM1,351,424.03 under OD facility I, RM222,374.80 under OD facility II, RM106,516.80 under FL facility I, RM117,808.52 under FL facility II and RM55,410.33 under FL facility III together with interests thereto accruing at 3.50% per annum above the bank's base lending rate which was currently computed at 6.80% per annum at monthly rests to the date of full settlement. And the plaintiff claimed for all these sums together with the interests thereto, as well as costs and such further; and other reliefs as this Honourable Court deems fit and proper to grant.

It is interesting to note that the letter of offer dated 30 March 1994 for OD facility I contained, *inter alia*, the following terms and conditions:

(i) that the plaintiff reserved the right to reduce, suspend or recall the facility without assigning any reason whatsoever; and

(ii) that the interest rate will be revised upwards if the account was not conducted in a satisfactory manner.

So much for the facts and I will now proceed to examine the law.

The Law – In Brief

Order 14 of the RHC is worded in this way (the relevant parts only):

> **1 Application by plaintiff for summary judgment (O. 14 r. 1)**
>
> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to amount of any damages claimed, apply to the Court for judgment against the defendant.
>
> (2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes:
>
> (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or
>
> (b) a claim by the plaintiff based on an allegation of fraud.
>
> (3) This Order shall not apply to an action to which Order 81 applies.

It is quite obvious that the purpose of an O. 14 application is to allow the plaintiff to obtain a speedy judgment where there is no defence to the claim (*Home and Overseas Insurance Co. Ltd v. Mentor Insurance Co (U.K.) Ltd (In Liquidation*) [1990] 1 WLR 153, 158). If the defendant's defence is a point of law which is plainly misconceived or is plainly unsustainable, then the plaintiff is entitled to judgment. An O. 14 application is also appropriate in a situation where the arguable question of law or construction is short and is dependent on a few documents (*Balli Trading v. Afalona Shipping, The Coral* [1993] 1 Lloyd's Rep. 1, CA; and *Crown House Engineering Ltd v. Amee Products Ltd* [1989] 48 BIR 32). According to

the case of *Drummer v. Brown* [1953] 1 QB 710 an action for damages for negligence is suitable for an O. 14 application where there is no defence as to liability.

An O. 14 application is a time saving device and it is both efficacious and expeditious and it is applicable to the following situations:

(a) in an action for an account (*Tan Eng Choong v. Foo Kai Yuen & Anor* [1988] 1 CLJ 691; [1988] 2 CLJ (Rep) 461);

(b) in an admiralty action (*The August 8* [1983] 2 AC 450 PC; and *Emmanuel E. Okwuosa & Ors v. The Owners of and Other Persons Interested in the Ship "MV Brihope" and Hong Leong Leasing Sdn Bhd (Interveners)* [1995] 2 CLJ 250);

(c) in a probate action;

(d) in an injunctive action (*Shell-Mex & BP Ltd v. Manchester Garages Ltd* [1971] 1 All ER 841; *Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors* [1989] 1 CLJ 919; [1989] 1 CLJ (Rep) 537 and *Shaik Alauddin v. Kamarutheen a/l K Dawood* [1988] 3 MLJ 336);

(e) in a declaratory proceeding (*Leco Investments (U.K.) Ltd v. Land Pyrometers Ltd* [1982] RPC 133, CA; *Centrovincial Estates plc v. Merchants Investors Assurance Co. Ltd.* [1983] Com. LR 158, CA; and *Wallersteiner v. Moir* [1974] 1 WLR 991, [1974] 3 All ER 217 are some examples of English authorities whereas the following authorities are reflective of the local courts: (i) *Avel Consultants Sdn Bhd & Anor v. Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209, (ii) *Ponniah v. Sivalingam & Ors* [1991] 3 MLJ 190, and (iii) *Chong Ket Sui David v. Datuk Chau Tet On (Chairman and office bearer of Royal Sabah Turf Club for and on behalf of himself and the Management Committee of the Royal Sabah Turf Club)* [1993] 3 CLJ 468); and

(f) in an action for specific performance where summary judgment is obtainable (*Leong Gan & Ors v. Tan Chong Motor Co. Ltd* [1969] 2 MLJ 8; *Verrall v. Great Yarmouth Borough Council* [1981] QB 202; *Beswick v. Beswick* [1968] AC 58; and *Posner v. Scott-Lewis* [1986] 3 WLR 531).

And the list is not closed. It will develop from time to time.

The preliminary requirements for an O. 14 application have been set out by Sean FJ (as he then was) in the case of *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 and there his Lordship itemised the following requirements:

(1) that the defendant must have entered an appearance;

(2) that the statement of claim must have been served onto the defendant; and

(3) that the affidavit in support of the application must have complied with the requirements of O. 14 r. 2 of the RHC.

According to Zakaria Yatim J (as he then was and who retired as a Federal Court Judge) in the case of *Fabrique Ebel Societe Anomyme v. Syarikat Perniagaan Tukang Jam City Port & Ors (supra)* that the plaintiff may proceed under O. 14 against one particular part of the claims that were included in the writ. Generally, it would be ideal if the application for an O. 14 be made before the delivery of the defence. But in a situation where the defence has been delivered, an application for summary judgment may still be filed provided it can be shown that the defence that has been filed is nothing more than a mere sham and is insubstantial – and, of course, the onus would be on the plaintiff to explain why he had not applied sooner (see the decision of Abdoolcader J in *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at 268 which applied vigorously the case of *McLardy v. Slateum* [1890] 24 QBD 504). It is now trite law that the proper way and the correct way to explain the delay would be by way of affirming an affidavit (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609). It is said that the plaintiff has to explain the delay in filing the application for summary judgment after the defence has been filed and it is said that the failure on the part of the plaintiff to explain the delay could be construed as fatal (*Loo Sze Kin v. Cheong Choy Teik* [1997] 4 MLJ 537; and *Krishnamurthy & Anor v. Malayan Finance Corporation Bhd.* [1986] 1 CLJ 541; [1986] CLJ (Rep) 170). But it is germane to mention that in the case of *Majlis Islam Negeri Johor v. United Mechant Finance Bhd (MUI Continental Insurance Sdn Bhd, Third Party)* [1995] 4 MLJ 482, the High Court in Johor Bahru had condoned the delay in filing the O. 14 application because the O. 14 itself was silent as to the consequences of the delay in filing the application for summary judgment.

Of pertinence to note would be this. That in an O. 14 application, the defendant needs only to show a triable issue (*Malaysian Assurance Alliance Bhd v. Yeam Sai Ming & Ors* [1996] 5 MLJ 345) and that triable issue would require a trial in order to determine it (*Voo Min En & Ors. v. Leong Chung Fatt* [1982] 2 MLJ 241). It is not sufficient for the defendant, in opposing an application for a summary judgment, to raise facts which do not constitute a defence to the claim nor is it sufficient for the defendant to merely advance a mere denial of indebtedness (*Wallingford v. Mutual Society* [1880] 5 App Cas 685 at p. 709; and *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690). So if a defendant says that he is not indebted to the plaintiff, it is essential that the defendant proceeds to explain why he is not so indebted (*Re General Rail Syndicate, Whiteley's Case* [1900] 1 Ch 365).

Megarry J in the case of *Miles v. Bull* [1968] 3 All ER 632 at p. 637 held the views that if a triable issue could not be raised by the defendant then the court must be satisfied whether there were circumstances that ought to be investigated and if the court was so satisfied then summary judgment will not be entered against the defendant. These simple principles of law were followed by other judges in two cases, namely, in the case of *Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd.* [1988] 2 MLJ 397; and the other case was that of *Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd* [1990] 3 MLJ 1. I will now proceed to reproduce the speech of VC George J (as he then was) in the case of *Lin Securities (Pte) v. Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party)* [1989] 1 MLJ 321 where at p. 322 of the report, his Lordship aptly said:

> Order 14 r. 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O. 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O. 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

Further down at p. 323 of the report, his Lordship continued:

> I have anxiously and carefully gone over the submissions that were made by learned counsel as well as the cause papers again and again and have to conclude that there are far too many questions to be dealt with in this matter, some of which are difficult questions of law. One such question is whether Singapore law applies. If it does then that alone proves

sufficient cause to deny the plaintiffs summary judgment. The appeal is allowed. The O. 14 judgment is set aside. The defendants are given unconditional leave to defend.

In *Marina Sports Ltd v. Alliance Richfield Pte Ltd* [1990] 3 MLJ 5, Yong Pung How J (as he then was) said at p. 6 of the report:

> This being an application under O. 14, it is not for the court to decide on the final merits of this issue, but only to provide an opportunity for the defendants to put up a defence if the court is satisfied that there is an issue which should be tried. There are clearly such issues, and accordingly the plaintiffs' appeal is dismissed with costs.

In *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182, Hashim Yeop A. Sani SCJ speaking for the then Supreme Court aptly said that an:

> Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

With these authorities in mind, I must now proceed to examine the arguments of the parties.

The Arguments Of The Parties – Were There Triable Issues? Were There Issues That Need To Be Investigated?

For this exercise, only two salient arguments of the parties will be highlighted. They may be stated as follows:

(a) It was argued on behalf of the defendant that the OD facility I was in the form of an overdraft facility to the tune of RM500,000 whereas the plaintiff claimed for the sum of RM1,351,424.03 calculated as at 15 November 1999 together with interest accruing thereon at 10.30% (which was 3.50% above the bank's lending rate of 6.80%) per annum at monthly rest until the date of the full settlement. By way of a rebuttal, the plaintiff argued through its learned counsel that this point was not alluded to in any of the defendant's affidavits and so it was urged that this court ought not to consider this point. It was emphasised that this point was raised by the learned counsel for the defendant and not by the defendant himself who ought to know about the facts of the case. It was submitted on behalf of the plaintiff that this point should not be allowed to be argued for the simple reason that it was prejudicial to the plaintiff who was unable to answer the allegation by way of an affidavit evidence. Briefly put, it was the contention of the learned

counsel for the plaintiff that a statement from the bar table should be rejected by this court. On the need to affirm an affidavit, the speech of Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v. Public Bank Bhd (supra)* at p. 615 would be apt to quote and there his Lordship had this to say:

> It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar, as was done in this case, is to be deprecated. To act as the learned judicial commissioner did in this case, is to ignore the very basic tenets of the law of evidence that is applied by our courts. Here was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay. Once this is done, then it is up to the judicial arbiter to accept or reject the explanation proffered. But to ride roughshod over such an important point, as was done here, does little to advance the course of justice according to the law.

But in an O. 14 application, the defendant was entitled to show by "affidavit or otherwise" (per VC George J in *Lin Securities (Pte) v. Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party) (supra)* whether he "has a defence and not whether the statement of defence provides him with a defence" (per VC George J in *Lin Securities (Pte)*'s case *(supra)*). That being the case, the issue of the claim for the sum of RM1,351,424.03 under the OD facility I as opposed to the actual quantum for the OD faculty I in the region of RM500,000 was certainly a triable issue to be adjudicated by this court. This was my judgment and I so hold accordingly.

(b) In regard to the issue of the letters of demand that were sent to the wrong address, an examination of the court file brought forth the following state of affairs:

(1) The writ of summons annexed to the statement of claim showed the address of the defendant to be at No: 69, Lorong Zaaba, Taman Tun Dr. Ismail, 60000 Kuala Lumpur.

(2) The letter from the plaintiff to the defendant in regard to the OD facility I and that letter has been exhibited as exh. "MIMD1" to the affidavit in support of Mohd Isniomar Mohd Daud as seen in encl. 4 showed the address of the defendant to be at No: 69, Lorong Zaaba, Taman Tun Dr. Ismail, 60000 Kuala Lumpur.

(3) The letter from the plaintiff to the defendant dated 5 October 1996 and exhibited as exh. "MIMD2" of encl. 4 showed the address of the defendant to be at No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur.

(4) The letter from the plaintiff to the defendant dated 14 March 1996 and exhibited as exh. "MIMD3" of encl. 4 showed the address of the defendant to be at No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur. The same address of the defendant can be seen in the plaintiff's letter to the defendant dated 5 October 1996 exhibited in exh. "MIMD4" of encl. 4.

(5) In Form 16A of the National Land Code the address of the defendant was listed as at No: 69, Lorong Zaaba, Taman Tun Dr. Ismail, 60000 Kuala Lumpur and the Annexure thereto also bore the same address of the defendant. All these can be seen in exh. "MIMD5" of encl. 4.

(6) In the second loan agreement between the plaintiff and the defendant dated 7 November 1996 as exhibited in "MIMD6" of encl. 4, the address of the defendant was listed as at No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur.

(7) In the second loan agreement between the defendant and the plaintiff dated 14 May 1996 as exhibited in "MIMD7" of encl. 4, the address of the defendant was stated to be at No: 69, Lorong Zaaba, Taman Tun Dr. Ismail, 60000 Kuala Lumpur.

(8) In the second loan agreement between the plaintiff and the defendant dated 19 November 1996 as seen in exh. "MIMD8" of encl. 4, the address of the defendant was recorded to be at No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur.

(9) In the first loan agreement between the plaintiff and the defendant dated 7 November 1996 as exhibited in "MIMD9" of encl. 4, the address of the defendant was listed as at No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur.

(10) In the first loan agreement between the defendant and the plaintiff dated 14 May 1996 as exhibited in "MIMD 10" of encl. 4, the address of the defendant was listed as at No: 69, Lorong Zaaba, Taman Tun Dr. Ismail, 60000 Kuala Lumpur.

(11) In the first loan agreement between the plaintiff and the defendant dated 19 November 1996 as exhibited in "MIMD11" of encl. 4, the address of the defendant was recorded as at No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur.

(12) In the deed of assignment between the defendant as the assignor and the plaintiff as the bank dated 7 November 1996 as seen in exh. "MIMD12" of encl. 4, the address of the defendant was listed as No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur.

(13) In the deed of assignment between the defendant and the plaintiff dated 14 May 1996 as seen in exh. "MIMD13" of encl. 4, the address of the defendant was recorded as at No: 69, Lorong Zaaba, Taman Tun Dr. Ismail, 60000 Kuala Lumpur.

(14) Again in another deed of assignment between the defendant as the assignor and the plaintiff as the bank dated 19 November 1996 as seen in exh. "MIMD14" of encl. 4, the address of the defendant was written as No: 12-1, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur.

(15) The letter of demand or the notice dated 18 June 1999 addressed to the defendant was at the following address at No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur and this can be seen at exh. "MIMD15" of encl. 4.

(16) The letter of demand or the notice to the defendant dated 23 July 1999 bore the defendant's address at No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur and this can be seen in exh. "MIMD16" of encl. 4.

(17) The letter of demand or the notice to the defendant dated 4 November 1999 bore the defendant's address at No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur and this can clearly be seen in exh. "MIMD17" of encl. 4.

From these set of facts, two pertinent questions arose: Why did the three letters of demand or the notices bore an address different from that oi the address as seen in the writ of summons? Was it by design that the three letters of demand or the notices were sent to the defendant's address at No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur? Miss Rachael Koh Meng Hui, the learned counsel for the plaintiff, submitted that the defendant's address that appeared in the three letters of demand or the notices were said to be the last known place of residence or business of the defendant and these three letters of demand or the notices were transmitted to the defendant by way of pre-paid registered posts. It was the stand of the plaintiff by way of a submission that the address at No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur was the address which the plaintiff used to communicate with the defendant and the defendant had acknowledged that address to be his by exhibiting three letters bearing that address marked as exhs. "MN1", "MN2A" and "MN2B" in the affidavit in reply of the defendant himself as seen in encl. 7. In affidavit form, there was an affidavit in reply affirmed by Koh Cher Kui for the plaintiff on 30 June 2000 which was filed on 3 July 2000 as seen in encl. 10. At para. 11(b) of that affidavit in reply in encl. 10, there was an averment that the letters of demand or the notices were already sent and correctly addressed and received by the defendant. This was the only affidavit that was affirmed for the plaintiff which alluded to the letters of demand or the notices and it was purely on this affidavit that the plaintiff argued that the address at No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur was the last known place of residence or business of the defendant. But, unfortunately, para. 11(b) of encl. 10 did not say that that was the last known place of residence or business of the defendant and, consequently, it was wrong for the learned counsel for the plaintiff to argue in the way she did in relation to the address at No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara. Be that as it may, cl. 2 of the annexure which was exhibited together with Form 16A of the NLC in exh. "MIMD5" of encl. 4 employed the following words to describe the manner of service of the notice of demand:

> ... and such notice shall be deemed to have been sufficiently served on the chargor(s) if it is addressed to the chargor(s) and left at the usual or last known place of residence ... or last known place of business of the chargor(s) ...

and it would be futile in the extreme for the plaintiff to rely on cl. 2 of the annexure because there was no affidavit evidence emanating from the plaintiff to show that No: 36-2, Medan Setia 2, Plaza Damansara, Bukit Damansara, 50490 Kuala Lumpur was the "usual or last known place of residence ... or last known place of business" of the defendant. Even the affidavit in reply of the plaintiff in encl. 10 at para. 11(b) thereof was of no assistance to the plaintiff. It was therefore part and parcel of my judgment that there was a triable issue in regard to the wrong address that was used to send the letters of demand or the notices. I was satisfied that the "usual or last known place of residence ... or last known place of business" of the defendant ought to be investigated. This was not a clear case for an O. 14 application (*Miles v. Bull (supra);* and *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd (supra)*).

There were other arguments that were advanced by both parties but they were inconsequential. I do not propose to regurgitate those arguments here. Suffice for me to say that the plaintiff had failed in their appeal. I accordingly dismissed the appeal in encl. 16 with costs.